EXHIBIT 4
DATE 3.8.11
SB 108

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Montana Legislative Services Division

Legal Services Office

TO: House Local Government Committee
FROM: Helen C. Thigpen, Staff Attorney
DATE: March 8, 2011
RE: Response to information request on "consultation and coordination" language in Senate Bill No. 108.

The House Local Government Committee heard Senate Bill No. 108 on March 3, 2011. During the hearing, I was asked to provide the Committee with additional information on the "consultation and coordination" language included in the bill. The following summary constitutes my response to this specific inquiry. The Committee should be aware that the Legislative Services Division is nonpartisan and does not have a position on SB 108.

As currently drafted, subsection (5) of SB 108 requires the Department of Fish, Wildlife, and Parks to ensure that county commissioners and tribal governments "have the opportunity for **consultation and coordination** with state and federal agencies prior to state and federal policy decisions involving large predators and large species." These terms are not defined in SB 108.

Presently, there do not appear to be any relevant definitions of the terms "consultation" or "coordination" in the Montana Code Annotated or the Administrative Rules of Montana. Nevertheless, there are additional sources of information the Committee may wish to consider. Specifically, the Committee should be aware that the Fifth Judicial District Court in Jefferson County recently addressed the term "consult" in a decision involving the preparation of a draft environmental impact statement (EIS) for the Mountain States Transmission Intertie (MSTI) project.[1]

In 2010, Jefferson County filed suit against the Department of Environmental Quality (DEQ) over the process of siting of the MSTI project. Jefferson County argued that DEQ failed to meet the consultation requirements of the Montana Environmental Policy Act (MEPA), which provides that:

> [P]rior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and with any local government, as defined in 7-12-1103, that may be directly impacted by the project. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved.[2]

Jefferson County argued that DEQ failed to meet the MEPA consultation requirements by not

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[1] *See* Or. Granting Petr.'s Mot. S. J. (Dec. 21, 2011).

[2] 75-1-201(1)(c), MCA.

sufficiently including the county within the process of preparing a draft EIS. DEQ argued that the MEPA consultation requirements were limited to the initial scoping process.

On December 21, 2010, the District Court ruled in favor of Jefferson County and ordered DEQ to "consult with and obtain comments from Jefferson County at all stages of the process." The Court based its order in part on its conclusion that "[t]he plain and ordinary meaning of 'consult' includes 'to seek advice or ask the opinion of.'" Under the District Court's ruling, DEQ must consult Jefferson County "during and after the preparation of a Draft EIS."

There is also a recent federal decision from the Ninth Circuit Court of Appeals that the Committee may wish to consider. In *California Wilderness Coalition v. U.S. Department of Energy*, 2011 U.S. App. LEXIS 1957, the petitioners challenged the Department of Energy's (DOE) implementation of the federal Energy Policy Act (EPA) and a provision that was added by the EPA to the Federal Power Act (FPA).[3] Section 216 of the FPA includes a provision that requires the DOE to conduct a study of electric transmission congestion in consultation with *affected states* and to issue a report, based on the study, "which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national electric transmission corridor." Section 216 also includes a separate requirement that affected states be given an opportunity to comment on the DOE's findings and recommendations.

A significant issue in the case was whether DOE failed to properly consult with the affected states in undertaking the study of electric transmission congestion as required by Section 216.[4] In assessing the case, the Ninth Circuit determined that "[a]n ordinary meaning of the word consult is to 'seek information or advice from (someone with expertise in a particular area)' or to 'have discussions or confer with (someone), typically *before* undertaking a course of action.'"[5] The Court noted that its interpretation was consistent with case law and rules of statutory interpretation and ultimately vacated the congestion study and the national corridor designation.

There are several additional federal environmental and land management statutes that require some level of coordination or cooperation with affected states and local governments. Several of these statutes are explained in more detail in a memorandum prepared by Todd Everts, legal staff for the Legislative Environmental Policy Office. I have attached a copy of Mr. Everts' memorandum for the Committee's review. In General, Mr. Everts's memorandum of April 28, 2010, reviews the coordinating requirements of the Multiple Use Sustained Yield Act of 1960 (MUSA) and the Federal Land Policy and Management Act of 1976 (FLPMA). It also summarizes the cooperation requirements of the National Environmental Policy Act (NEPA). The central conclusion of Mr. Everts' review is that:

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[3] 16 U.S.C. § 824p.

[4] *California Wilderness Coalition*, 2011 LEXIS at *6.

[5] 2001 LEXIS at *27.

Coordinating and cooperating federal requirements provide state and local governments with duly adopted plans and policies the ability to directly influence federal natural resource and land management planning and environmental review activities.

Please let me know if I may provide additional assistance.

Thank you,

Helen C. Thigpen

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April 28, 2010

TO: Representative Chas Vincent

FR: Todd Everts, Legal Staff

RE: County Growth Policies and Coordination and Cooperation with Federal Land Management Agency Environmental Review and Planning Processes

You have specifically asked that I analyze the following issue:

> **Is a county growth policy (a comprehensive land use management plan) that is authorized under state law and that is properly adopted pursuant to state law the most legally defensible tool that Lincoln County can use for effectively impacting federal land management agency environmental review and planning processes that are subject to federal cooperating and coordinating requirements?**
>
> **Short Answer:** Yes. A county growth policy is the only county comprehensive land use management planning mechanism specifically authorized pursuant to state law. A county growth policy that includes all or some of the discretionary content elements and adheres to the statutory due process adoption requirements is, for all practical and legal purposes, the county's legally authorized position and statement with respect to land use management decisions made within the county's jurisdiction. An officially adopted growth policy provides a county with a comprehensive and legally defensible basis within the context of federal cooperating and coordinating requirements in order to effectively impact a federal land management agency's environmental review and planning process.

Legal Analysis

On two separate occasions I have previously analyzed the vagaries of federal cooperating and coordination requirements in tandem with Montana state and local government statutory authority.[1] I concluded that:

> 1. Coordinating and cooperating federal requirements provide state and local governments with duly adopted plans and policies the ability to directly influence federal natural resource and land management planning and environmental review activities.

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[1] See my previous legal opinions written for the Fire Suppression Interim Committee and for Senator Curtiss.

State and local government cooperation and coordination with federal land management agencies could result in a significant commitment of time and resources. Those state and local entities that have committed time and resources to cooperate and coordinate with federal agencies have reported positive concrete results in terms of influencing federal land management decisions.

2. Federal land management agency coordination requirements do not limit coordination just to county or city government, but extend coordination to other units of local government. Units of local government eligible to coordinate could also include school districts, irrigation districts, water quality districts, fire districts, etc. Under Montana law, a growth policy can be requested by a governing body of a city or county. Coordination with federal land management agency planning processes can occur either through county growth policies or other local government authorized plans, policies, or laws.

You have asked me to address whether a county growth policy is the most legally defensible tool that Lincoln County can use to effectively impact federal land management agency planning and environmental review processes in conjunction with federal cooperation and coordination requirements.

County Government Authority

Under the Montana Constitution, counties fall into two categories:

1. *Self Governing Counties*: those counties that have adopted a self government charter may exercise any power not prohibited by the constitution, law, or charter.[2] Only three counties in Montana that I am aware of have self governing charters: Anaconda-Deer Lodge, Butte-Silver Bow, and Fergus.

2. *General Governing Counties*: those counties without self-government powers have powers provided or implied by law and those powers must be liberally construed.[3]

Simply put, general governing counties like Lincoln County must ask permission from the Legislature for authority.[4] Self governing counties can exercise any authority as long as it is not expressly prohibited.[5]

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[2] Article XI, section 5, Montana Constitution

[3] Article XI, section 4, Montana Constitution

[4] See enumerated county powers, 7-1-2103, MCA

[5] See enumerated prohibitions, 7-1-111, MCA

As a general governing county, Lincoln County's only statutorily authorized comprehensive land use management planning mechanism is the growth policy planning process.[6] Montana law authorizes a county to create a planning board.[7] If requested by a county governing body, a planning board is required to prepare a growth policy.[8] Growth policies may, at the discretion of the county, cover all or part of the jurisdictional area and include an extensive list of discretionary elements, such as land use patterns, economic conditions, local services, cultural and historic information, and natural resources.[9] There are a series of statutorily authorized public participation steps or due process requirements that a county must follow for the proper adoption of a county growth policy.[10] The governing body of a county that properly adopts a growth policy must be guided by and give consideration to the general policy and pattern of development set out in the growth policy.[11]

A county growth policy that includes some or all of the discretionary content elements and adheres to the statutory due process adoption requirements is, for all practical and legal purposes, the county's legally authorized position and statement with respect to land use management decisions made within the county's jurisdiction. Because Lincoln County is a general governing county, a growth policy is the only statutorily authorized mechanism that allows Lincoln County to conduct county comprehensive land use planning. Any other adopted county comprehensive land use planning mechanism that did not adhere to the statutory growth policy requirements would likely be legally suspect as an exercise of a non-granted county government power.

As I have concluded previously, this does not prohibit local government units (irrigation districts, water quality districts, fire districts, etc.) within a county from coordinating and cooperating with federal agencies. However, local government unit coordination and cooperation is limited based on the statutory authorization and jurisdiction of the local government unit.

Federal Coordination Requirements

The U.S. Forest Service under the Multiple-Use Sustained Yield Act of 1960 (MUSA) and the and the U.S. Bureau of Land Management (BLM) under the Federal Land Policy and Management Act of 1976 (FLPMA) are both required to coordinate their natural resource and

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[6] 76-1-601 through 76-1-606, MCA.

[7] 76-1-101, MCA

[8] 76-1-106(1), MCA

[9] 76-1-601(3), MCA

[10] 76-1-602 through 76-1-604, MCA

[11] 76-1-605(1), MCA

land planning processes with those of state, local, and tribal jurisdictions. The Forest Service must coordinate "with the land and resource management of State and local governments."[12] The Forest Service must provide opportunities for coordination between the Forest Service planning efforts and those of other resource management agencies.[13] The Forest Service is required to seek assistance (where appropriate) from state and local governments in the planning process.[14] If there is any inconsistency between the Forest Service planning process and state and local plans and laws, the Forest Service is required to discuss the inconsistencies and document in the plan the extent to which the Forest Service would reconcile its proposed action with the state or local plan or law.[15]

Unlike the Forest Service, the BLM's land use planning process is explicitly required to "be consistent with State and local plans to the maximum extent consistent with Federal law and the purposes of [FLPMA]".[16] BLM's regulations require that BLM resource management plans must be:

> **consistent with officially approved or adopted resource related plans, and the policies and programs** contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.[17] (emphasis added)

It is also required of the BLM that:

> in the absence of officially approved or adopted resource-related plans of other Federal agencies, State and local governments and Indian tribes, guidance and resource management plans shall, to the maximum extent practical, be consistent with **officially approved and adopted resource related policies and programs** of other Federal agencies, State and local governments and Indian tribes. Such consistency will be accomplished so long as the guidance and resource management plans are consistent with

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[12] 16 U.S.C 1604(a)

[13] 36 C.F.R. 219.9

[14] Id.

[15] 40 C.F.R. 1506.2(d)

[16] 43 U.S.C. 1712(b)(9)

[17] 43 C.F.R. 1610.3-2(a)

> the policies, programs and provisions of Federal laws and regulations applicable to public lands, including, but not limited to, Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise and other pollution standards or implementation plans.[18] (emphasis added)

It should be noted that BLM regulations provide that where "State and local government policies, plans, and programs differ, those of the higher authority will normally be followed."[19]

Coordination with the Forest Service or the BLM seems to provide a county that has an officially adopted plan some legal leverage when it comes to incorporation of county government planning priorities within the federal land management agency resource management planning process. Through the use of a duly adopted plan, a county government can formally identify and interpret the criteria that federal agencies are required to consider when those agencies develop resource management plans.

Federal Cooperation Requirements

Generally, the National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental considerations into the federal planning and decision-making process.[20] NEPA requires that for any major federal action that may significantly affect the quality of the human environment, an environmental impact statement (EIS) must be prepared.[21] Federal agencies required to comply with NEPA must do so in "cooperation with State and local governments" or other entities that have jurisdiction by law over the subject action or special expertise.[22] NEPA regulations emphasize cooperative consultation among agencies before an EIS is prepared.[23]

With the agreement of the lead agency, a state or local government agency may become a cooperating agency under NEPA.[24] Technically, a "cooperating agency" means:

> any federal agency other than a lead agency which has jurisdiction by law or special

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[18] 43 C.F.R. 1610.3-2(b)

[19] 43 C.F.R. 1610.3-2(c)

[20] 42 U.S.C. 4332 (2)(A)

[21] 42 U.S.C. 4332(2)(C)

[22] 42 U.S.C. 4331(a), 4332(2)

[23] 40 C.F.R. 1501.1(b)

[24] 40 C.F.R. 1508.5

expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in Sec. 1501.6. A state or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.[25]

With respect to cooperating agencies, a lead agency is required to:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.
(2) Use the environmental analysis and proposals of cooperating agencies that have Ujurisdiction by law or special expertise to the maximum extent possible consistent with lead agency responsibilities.
(3) Meet with a cooperating agency if requested to do so.[26]

If a county is designated as a cooperating agency, the county is required to:

(1) Participate in the NEPA process at the earliest possible time.
(2) Participate in the scoping process.
(3) Assume, on request of the lead agency, responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement for which the cooperating agency has special expertise.
(4) Make available staff support at the lead agency's request to enhance the lead agency's interdisciplinary capability.
(5) Use its own funds. However, the lead agency shall, to the extent that there are available funds, fund those major activities or analyses it requests from cooperating agencies.[27]

In response to a lead agency's request for assistance in preparing an EIS, a county may notify the lead agency that other program commitments preclude any county involvement in the EIS process.[28]

A lead agency is required to cooperate with a county to the fullest extent possible to reduce duplication between NEPA and comparable county requirements, unless the agencies are

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[25] 40 C.F.R. 1508.5

[26] 40 C.F.R. 1501.6(a)

[27] 40 C.F.R. 1501.6(b)

[28] 40 C.F.R. 1501.6(c)

specifically barred from doing so by some other law.[29] To better integrate an environmental impact statement into a county planning process, a statement must discuss any inconsistency of a proposed action with any approved county plan and laws. Where an inconsistency exists, the statement should describe the extent to which the federal agency would reconcile its proposed action with the plan or law.[30]

It is important to note that a county's role as a cooperating agency in NEPA's environmental analysis "neither enlarges nor diminishes the final decision-making authority of any agency involved in the NEPA process".[31]

Cooperative agency status under NEPA allows a county a seat at the lead federal agency round table at the front end of the NEPA process. It allows the county to identify issues in the scoping process as an agency peer. It allows a county to develop information and prepare NEPA analysis which may potentially be included in the environmental review. It allows county staff to be intimately involved in the interdisciplinary team process. However, the lead agency has ultimate decision making authority under NEPA.

Conclusion

Based on the federal and state authority analyzed and cited above, if Lincoln County wants to establish a legally defensible coordinating or cooperating relationship with a federal land management agency that effectively impacts federal environmental review and planning processes, official approval and adoption of a statutorily authorized growth policy that comprehensively outlines the county's land use and resource priorities is essential.

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[29] 40 CFR1506.2(c)

[30] 40 CFR1506.2(d)

[31] Council of Environmental Quality Memorandum for State and Local Governmental Entities, Regarding Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, James Connaughton, Chair, February 4, 2002.